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No. 99-1644

Supreme Court, U.S.
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In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

vs.

THE BANK OF NEW YORK and
FRED STANTON SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming a district court affirmance of two bankruptcy court orders that denied the debtor/Petitioner any further relief under another district court order in these proceedings entered over ten years ago?

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STATEMENT OF JURISDICTION

The Petitioner asserts that jurisdiction exists under 28 U.S.C. § 1254(1). No jurisdiction exists, however, as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuit courts of appeal. Sup. Ct. R. 10.1(a) through (c); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991).

STATEMENT OF THE CASE

Introduction

This case is the eighteenth attempt in this Court by the Petitioner and four affiliated co-debtors in the consolidated bankruptcy proceeding – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The debtors have commenced and prosecuted, unsuccessfully in each instance, approximately 48 appeals to

[1] Two additional petitions were filed with the petition in this case (Case Numbers 99-1642, 99-1643). Of the 15 previous petitions to this Court, 14 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court. The bankruptcy cases were finally closed in September, 1998.

the court of appeals, and approximately twice as many appeals in the district court, in the fourteen years since a creditors' plan of reorganization was confirmed. For his serial, collateral attacks, the debtor/Petitioner has been sanctioned on several occasions. The present Petition is also frivolous.

The Nature of the Case Below

This is an appeal from a ruling of the Eleventh Circuit Court of Appeals, [Petitioner's App. 1], affirming a district court order of March 11, 1999. [Petitioner's App. 3.] The district court affirmed two bankruptcy court orders, entered December 8, 1997, [*id.* at 21], and May 11, 1998. [*Id.* at 13.]

Both bankruptcy court orders were rulings on attempts by Petitioner to alter rulings made by the district court some ten years earlier, [*id.* at 29], and affirmed by the court of appeals on January 9, 1991. [*Id.* at 31.]

Course of the Proceedings Below

The Holywell/Miami Center bankruptcies began in August, 1984, after Respondent, The Bank of New York ("Bank") had commenced a state court foreclosure on over $200 million in defaulted construction debt.

Debtor/Petitioner Theodore B. Gould owned 100% of debtor Holywell Corporation ("Holywell"), which in turn owned 100% of a non-debtor subsidiary called Twin Development Corporation ("Twin"). Petitioner was also a

general partner of debtor Miami Center Limited Partnership ("MCLP"), owner and developer of the hotel and office building improvements.

As recounted by the district court in its 1988 Order, [Petitioner's App. 31], debtor MCLP needed cash in 1985 to pay property taxes and to complete some of the improvements. MCLP sought and obtained permission to obtain approximately $4.7 million from the estates of Petitioner, Holywell, and Twin on a "super-priority" basis. Petitioner did not disclose to the bankruptcy court or to the creditors that he would later take the position (after he and Holywell had been discharged of their own debts under 11 U.S.C. § 1141(d)) that he, Holywell, and Twin were entitled to be repaid the monies they had loaned, "free and clear" of creditors' claims.

After these loans were approved and funded, the Bank's amended, consolidated plan of reorganization was "overwhelmingly" approved by the creditors and confirmed by the bankruptcy court. *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. den.*, 488 U.S. 823 (1988). The Bank's plan (the "Plan") provided for substantive consolidation in order to eliminate a complex web of inter-debtor loans and joint and several obligations.

Twin, as an affiliate of the debtor/Petitioner, was given "Class 8" priority, junior to the claims of all creditors that were not debtors or insiders. Petitioner, Holywell, and their co-debtors were "Class 9" – a residual, lowest priority for the equity interests.

Thus, Twin and the debtors were only to receive distributions if all other creditors were first paid in full.

After confirmation, the debtors were discharged; 11 U.S.C. § 1141(d).

All of the cash, property rights, and choses in action held by the debtors as of the confirmation date became part of the "Miami Center Liquidating Trust" on that date (October 10, 1985). Respondent, Fred Stanton Smith[2] was appointed the Liquidating Trustee ("Trustee"); the Plan directed him to use the Trust assets to pay claims according to the priorities set forth in the Plan.

As the district court noted in its 1988 ruling, [Petitioner's App. 37 n.12], on the Plan's effective date, the Trustee both *owned* and *owed* the post-petition loans.

But the debtor/Petitioner took a different position. He claimed that he, *as the discharged debtor*, somehow had the right to collect the post-petition loans, *free of the claims of creditors*.

The bankruptcy court, evidently believing that there would be funds sufficient to pay all senior classes, ordered repayment of the post-petition loans to the discharged debtors in 1987. The Bank appealed, and the district court reversed in 1988, [Petitioner's App. 31], remanding to be certain that any repayment of the post-petition loans would go to the debtors' estates, "subject to the claims of the remaining creditors", and to determine,

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[2] On September 9, 1998, the bankruptcy court entered a Final Decree determining that Smith had fully and faithfully performed all his duties, discharging him from further liability, and closing the five bankruptcy cases. Petitioner's appeals from that order to the district court and court of appeals were unsuccessful.

where necessary, "the specific source of the repayment funds." [*Id.* at 42.] The debtor/Petitioner appealed that 1988 district court ruling and the court of appeals affirmed it, noting that, "the district court's determination is mandated by the express terms of the plan of reorganization and by common sense." [*Id.* at 29.] The court of appeals also found that Petitioner's challenge to the validity of the Liquidating Trustee was, "frivolous and moot." [*Id.*]

In late 1993, the debtor/Petitioner moved the bankruptcy court to conduct remand hearings to determine his rights to payment of the post-petition loans. By order entered March 9, 1994, the bankruptcy court held that the issue would not be ripe for adjudication, "unless and until the Trustee determines that there will be Trust assets available for distribution to the Debtors after all creditors with priority claims have been paid." [Petitioner's App. 25.]

In 1997, the final asset of the Liquidating Trust was reduced to cash[3] in a settlement approved by bankruptcy courts in New York City[4] and Miami. These funds left the Liquidating Trust short, by many millions of dollars, of funds sufficient to provide full distributions to the remaining creditors (much less to the debtors and their affiliates, Classes 8 and 9).

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[3] This was debtor/Petitioner Gould's residual interest in Miami Center Joint Venture, which owned the four vacant lots next to the hotel and office building.

[4] Petitioner's former partner, Olympia & York Florida Equity, had also gone into bankruptcy, in the Southern District of New York.

Undaunted, Petitioner renewed his request for a remand hearing regarding the post-petition loans and filed an adversary proceeding seeking that relief as well.

The Bank moved to dismiss the adversary complaint on the grounds, among others, that Petitioner had not complied with prior orders and sanctions relating to frivolous and barred claims. The bankruptcy court granted the motion and dismissed the complaint on December 8, 1997. [Petitioner's App. 21.] Petitioner's motion for rehearing was denied.

Meanwhile, the bankruptcy court conducted a remand hearing on April 14, 1998. Concluding from the testimony and financial reports of the Trustee that the remaining administrative claims and "Trustee's Certificate" claim of the Bank[5] would more than consume the remaining funds of the Trust and that no further funds would be available for the debtors and their affiliates, the bankruptcy court held that any further issues regarding the post-petition loans were moot. [Petitioner's App. 13.] The debtor/Petitioner's appeal to the district court was

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[5] Under the terms of the confirmed Plan, the Bank advanced $22.3 million to pay a priority claim for furniture, fixtures, and equipment in the Miami Center project. For doing so, the Bank received a Trustee's Certificate providing for repayment before any distributions to the debtors or their affiliates. Petitioner contested and appealed the issuance of the Trustee's Certificate, but the bankruptcy court, district court, and the court of appeals all held that such issuance was proper. *Holywell Corp. v. The Bank of New York*, Case No. 94-0997-Civ-Ryskamp; *aff'd*, Eleventh Cir. Case No. 95-5351 (unreported op. April 30, 1997; U.S. Sup. Ct. mandamus denied 97-784 (Jan. 26, 1998)).

unsuccessful, [*id.* at 3], as was the appeal to the court of appeals. [*Id.* at 1.] This petition followed.

STATEMENT OF FACTS

Most of the pertinent facts have been described in the preceding section.

Petitioner has a long history of frivolous pleadings and sanctions for contempt – warranting the dismissal of adversary proceeding 97-1119 in the bankruptcy court. Specifically:

1. On May 1, 1990, the bankruptcy court held Petitioner, Holywell, and their Virginia lawyer in contempt. This Order was appealed and affirmed. The debtor/Petitioner was ordered to obtain representation from an attorney licensed to practice in the Southern District of Florida before filing further pleadings, [Petitioner's App. 22], in an effort to control his practice of raising, "on a serial basis the same claims and arguments which have been continuously rejected by this and other courts." [*Id.* at 9.]

2. In the "Trustee's Certificate" proceeding, the bankruptcy court found that the debtors and their Virginia lawyer violated Fed. R. Bankr. P. 9011, equivalent to Fed. R. Civ. P. 11, in filing "repeated collateral attacks", re-arguing "previously adjudicated matters", and asserting "legally baseless" claims. [*See id.* at 9, 22-23.] The bankruptcy court ordered the debtor/Petitioner to pay the Trustee $24,770.00 for attorney's fees and costs.

3. The court of appeals affirmed lower court contempt orders awarding over $138,000.00 to the Bank and

Trustee for attorney's fees and costs occasioned by the debtor/Petitioner's direct disobedience of court orders. *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

Finally, a final judgment of contempt imposing sanctions of $1.3 million against Petitioner was entered by the district court in 1993. Petitioner has never paid the sanctions.

The Respondents dispute the debtor/Petitioner's statements of fact and procedural history. Because so much of those statements is irrelevant to the narrow legal issues presented here, the Respondents will not engage in a point-by-point refutation.

SUMMARY OF ARGUMENT

The bankruptcy court, district court, and court of appeals committed no error. Petitioner, though a non-lawyer, must comply with court orders if he wishes to prosecute his claims and appeals. His right to self-representation is not a license to disregard court orders, to refuse to pay court-ordered sanctions, and to endlessly reassert previously-adjudicated arguments. The right to self-representation, like any other right, may be waived if abused.

The substantive consolidation of the bankruptcy estates caused the estate to both own and owe the previous inter-debtor loans. Petitioner had no right to be repaid before creditors.

ARGUMENT

I. Self-Representation

Petitioner's self-representation argument was lost years ago when he unsuccessfully appealed the bankruptcy court's certification of contempt. That order required, "that an attorney admitted to practice before the United States District Court for the Southern District of Florida and the United States Bankruptcy Court" be required to sign all further pleadings filed for or on behalf of Petitioner in order that control be placed over his continuing to raise on a serial basis the same claims and arguments which have been "continuously rejected by this and other Courts." [Petitioner's App. 9, 22].

That final order may not now be collaterally attacked here. Petitioner failed to comply with that order, failed to pay the contempt judgment entered by a district judge, and failed to pay a further sanctions award to the Trustee ordered by the bankruptcy court in 1994.

Petitioner has not cited any case[6] – because no such case exists – for the proposition that a *pro se* litigant may prosecute claims while in violation of court orders such

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[6] Indeed, Petitioner's largely irrelevant citations are to cases involving whether a criminal defendant invoked the right to self-representation. Some directly contradict Petitioner's position. [Petition at 22 (citing *DeNardo v. Murphy*, 781 F.2d 1345, 1348 (9th Cir. 1986) ("Although litigiousness alone is no reason to enjoin future litigation, frivolous claim by a litigious plaintiff may be extremely costly to defendants and can waste valuable court time.") (citation omitted) (affirming an injunction against future litigation), *cert. denied*, 476 U.S. 1111 (1966)).]

as these. The latitude, patience, and deference accorded to *pro se* parties is enormous, but not limitless.

Pro se parties may be sanctioned under Federal Rule of Bankruptcy Procedure 9011, and they have the same duties under that Rule as an attorney. *In re Weiss*, 111 F.3d 1159, 1169 (4th Cir. 1997). Bankruptcy courts also have inherent power, as do other federal courts, to punish bad faith conduct amounting to the abuse of the litigation process. *In re Graffy*, 233 B.R. 894, 898 (Bankr. M.D. Fla. 1999) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123 (1991)).

Courts have repeatedly addressed the issue of, "attempting to stem the filing and litigating of patently frivolous lawsuits by overly litigious *pro se* litigators", in cases such as *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986), and *Traylor v. City of Atlanta*, 805 F.2d 1420 (11th Cir. 1986). Trial courts have, "considerable discretion in restricting the filings of such a litigator." *Traylor*, 805 F.2d at 1421. Petitioner was not foreclosed from any access to the bankruptcy court;[7] he simply had to comply with the contempt and sanctions orders, and to retain counsel as directed *or* to demonstrate why he should be relieved of that requirement. Petitioner failed or refused to do any of those things.

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[7] Indeed, Petitioner was allowed to appear in both the bankruptcy court and the district court to argue why he should not be required to comply with the prior contempt and sanctions orders.

The district court correctly held that the right to self-representation may be lost by a litigant engaging in abusive or disruptive behavior. [Petitioner's App. 22 (citing *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972)).]

II. The Lower Court Orders Were Correct

A. The Petitioner Is Bound By Prior Rulings

In the 1988 order reversing in part and remanding, affirmed by the Eleventh Circuit Court of Appeals in 1991, the district court squarely held that the debtor/Petitioner could not obtain repayment of the post-petition loans *free* of the claims of creditors. [Petitioner's App. 31.]

The 1992 income tax ruling by this Court[8] did not address or affect that determination. This Court certainly did not say that Holywell and Petitioner, *as discharged debtors*, are entitled to be repaid the post-petition loans *even if* their bankruptcy creditors have not yet been paid.

This Court did not say that, because the issue was not before it, and because such an absurd holding would have violated the "absolute priority rule" enunciated by this Court in *Consolidated Rock Products Co. v. Dubois*, 312 U.S. 510, (1941).

Petitioner's assertion, that either the Bank or the Trustee *personally* should repay the superpriority loans is

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[8] In 1992, this Court upheld the IRS position that the Liquidating Trust was obligated to file returns and pay income taxes with respect to the debtors' assets. *Holywell Corp. v. Smith*, 503 U.S. 47 (1993).

absurd. The assets of the Trust were to be used to repay the loans, and the Trust both owned and owed the loans. As always, the debtor/Petitioner hopes to change the terms of the confirmed plan and to force the Bank to fund those amounts. Such claims have been repudiated by the courts repeatedly in these cases:

> Here, the debtors again attempt to tamper with the terms of the sale of the property. This would strike at a crucial element of the reorganization plan. Since the debtors failed to post an appeal bond, the reorganization plan was implemented; the plan has been substantially consummated. The debtors' efforts again to require the Bank to "sweeten the pot" after this principal transaction, the sale of the property, has been completed must fail.

In re Holywell Corp., 901 F.2d 931, 934 (11th Cir. 1990).

In 1993, the bankruptcy court held that the Bank – under its indemnity and as a matter of negligent misrepresentation to the Trustee[9] – would have to bear the ultimate income tax costs if the Trustee lacked the funds to do so. That decision did *not* provide for any indemnification or obligation to Petitioner, however. In fact, the debtor/Petitioner's counterclaims in the income tax adversary proceeding were rejected by the bankruptcy court (a determination affirmed on appeal).

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[9] The Plan did not disclose a tax liability or consequence. Therefore, reasoned the bankruptcy court, the Bank (and not the Trustee) must bear the consequences. The IRS obligations and Trustee-Bank claims were settled.

Finally, the debtor/Petitioner has disregarded the Eleventh Circuit Court of Appeals opinion of January 9, 1991 [Petitioner's App. 29]:

> In this case, the appellants challenge the district court's determination that certain "super priority" loans be repaid to the estates of the debtors, rather than the discharged debtors. The district court's determination is mandated by the express terms of the plan of reorganization and by common sense. Appellants also challenge the validity of the trustee in this case. This contention is frivolous and moot.

It is clear, therefore, that the district court's determination was affirmed by the Eleventh Circuit Court of Appeals. Years later, the Petitioner cannot sneak around waiting creditors to obtain repayment of the loans as a "discharged debtor."

B. The Bankruptcy Court Orders Did Not Depart From the "Law of the Case"

The debtor/Petitioner also argues that the bankruptcy court failed to follow the "law of the case". He theorizes that there has been some holding that the Bank's Trustee's Certificate is somehow junior to the debtors' rights to obtain payment.[10] There has been no such holding, so it is not the law of this or any other case.

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[10] Petitioner points out that the loans were to be repaid ahead of other administrative expenses, and then leaps to the conclusion that he personally should have been paid ahead of other administrative expenses. This claim is absurd. Even if the loans were repaid from one estate to another (which estates were substantively consolidated), then the administrative expenses and creditors would still be repaid before the debtor.

To the contrary, the terms of the confirmed plan and of all rulings in the separate "Trustee's Certificate" litigation have held that the Bank obtained priority over the claims of all debtors and affiliates by loaning the Trustee the money to pay a priority claim. The terms of a confirmed plan are binding on all parties, and may not be collaterally attacked. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

So the "law of the case" supports the rulings of the bankruptcy court, and the bankruptcy court did not make any ruling that abrogated, or even modified, prior rulings in these cases.

CONCLUSION

None of the appropriate grounds for certiorari are present. The three lower courts correctly and unanimously ruled that Petitioner's claims are barred and that the proceeds of liquidation didn't provide enough money to permit the inter-debtor loans to be repaid. Petitioner's theory – that those inter-debtor loans must be repaid to him as a discharged debtor, and before all of his creditors were paid – was rejected by the district court in 1988 and the court of appeals in 1991, and should be rejected again.

For all these reasons, it is respectfully submitted that the writ should be denied.

Respectfully submitted,

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